application of the rules of the civil law, and *jus gentium*, though the law of Scotland on this point is asserted to be founded on them."

It was therefore ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Sir J. Scott, W. Alexander.*
For Respondent, *Ilay Campbell, Chas. Hope, J. Campbell.*

NOTE: *Appellant's Authorities, (Scottish).*—Henderson's Children, Durie, fol. 88; Schaw *v.* Lewins, 1 Stair's Decisions, fol. 252; Brown and Duff *v.* Bizot, 1 Stair and Dirleton's Decisions, 29 July 1666; Brown *v.* Brown, Lord Kilkerran, *voce* Foreign, Falconer, 24th November 1744; Morrison and Others *v.* Earl of Sutherland, Lord Kilkerran *voce* Foreign, June 1749; Davidson *v.* Elcherson, Fac. Coll. 13th January 1778; M'Lean *v.* Henderson, *Eodem die.*

Foreign Authorities.—Vattel, a French Jurist, Liv. II. cap. 8, § 100.

Denisart, *voce* Domicile, § 3-4.

Civil Law.—Voet. Comment. ad Pandect, lib. 38, t. 17, § 34.

Vinnius, Quest. sel. lib. 2, c. 19.

Dutch Law.—Van Leuwen, Censura Forensis, lib. 3, 6, 12, § ult.

Huber. Prælectiones Juris Civilis et Hodierni, pars. 1, lib. 3, tit. 13, § 21; pars. 2, lib. 1, tit. 3, § 15.

English Authorities.—Thorne *v.* Watkins, 2 Vez. 35.—Kilpatrick *v.* Kilpatrick, Rolls, 27th July 1787; Burne *v.* Cole, 7th April 1763; 3 Haggard's Eccles. Rep. p. 462.

[Mor. p. 8769.]

SIR WM. FORBES, Bart., GEORGE SKENE and Others, Freeholders of the County of Aberdeen, ... } *Appellants;*

SIR JOHN MACPHERSON, Bart., . . *Respondent.*

House of Lords, 19th April 1790.

ELECTION—VOTING—QUALIFICATION.—The Duke of Gordon granted a liferent superiority to Sir John Macpherson, then residing in India, and, under this title, his agents claimed to have him enrolled on the roll of freeholders. The statutory oath, devised to detect nominal and fictitious qualifications, was not put; but an objection was stated to his being put upon the roll, on the ground that his

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title was fictitious and nominal. The court of freeholders put him upon the roll. On complaint to the Court of Session, the appellants insisted that certain interrogatories, embodying the averments made in process, should be put to the respondent. Held, by the Court of Session, that it was incompetent to put such interrogatories. Reversed in the House of Lords; and held, that the statutory oath, which was not taken in this case, did not shut out all other, or further inquiry; and remit made, with order to ordain him to confess or deny the averments put on record in the appellants' pleadings.

In the month of October 1788, the respondent claimed to be enrolled as a freeholder in the county of Aberdeen, upon the following titles, viz. 1. Charter of resignation in favour of Alexander, Duke of Gordon, his heirs and assignees, of the lands, lordships, and others therein mentioned; comprehending, *inter alia*, the lands and barony of Touch, Cluny, and Midmar, of which the following lands are parts and pertinents, viz. all and whole the lands of Finlettrie, with the pertinents therein specified; as also the town and lands of Tellymair, Tellygownil, and Haybogs, with the mill, mill lands, and astricted multures of Tellymair, and whole pertinents of said lands, all lying within the parish of Touch, and sheriffdom of Aberdeen, which charter bears date the 7th August 1786. 2. Disposition by the said Alexander Duke of Gordon, of the lands and others before mentioned, in favour of the respondent in liferent, containing an assignation to the said charter, and precept of sasine therein contained, so far as respects the said lands and others above mentioned; which disposition is dated the 26th September 1786. 3. Instrument of sasine following upon the said charter and disposition, dated the 27th, and recorded in the particular register of sasines kept at Aberdeen the 29th of the said month of September 1788.

It was alleged by the appellants and other freeholders, that the Duke of Gordon was in the practice of manufacturing fictitious votes to a large extent, by granting qualifications to his numerous friends. Among others, he had granted the above qualification to Sir John M'Pherson, then Governor General at Bengal.

But to his claim to be enrolled as a freeholder the appellant George Skene stated the following objection:—"That "the qualification therein described, upon which the said "Sir John M'Pherson claims to be enrolled as a freeholder "of this county, is nominal and fictitious, confidential, and

" created for the sole purpose of enabling him to vote, and " that in defiance of the statute of the 7 of George II., and " of the other laws respecting the qualifications of freehold- " ers entitled to vote in the election of members to serve in " parliament for this county."

To this objection the respondents' agent made the following answer:—" That the objection is without founda- " tion, and arises merely from presumption; that the claim- " ant is a real and true purchaser of the superiority, for a " price actually paid; and therefore it would be doing an " injustice to deprive him of the benefit of that purchase, as " no objection has been or can be stated to his titles to be " enrolled."

The majority of the freeholders being satisfied with this answer, the respondent was admitted to the roll.

The appellants then complained against this judgment to the Court of Session, under the authority of the statutes; stating that *ex facie* of the transaction, it evidently appeared that it never was the object of these titles to convey to the respondent any real or substantial estate, or even to afford him an independent free qualification, and insisting that the respondent should answer certain interrogatories tending to expiscate the fictitious nature of his title and qualification; such as, That the conveyance of the lands contained in his title was made without his previous consent or knowledge, and that the expenses of these titles were borne by the Duke. That they were never delivered to the respondent before his enrolment, or at any time in his possession. And whether he considered himself bound in honour to vote for the Duke's candidate, and to renounce his freehold qualification at his Grace's pleasure.

The Court of Session pronounced this interlocutor:— Mar. 6, 1789.
" The Lords having advised this petition and complaint, " with the answers thereto, replies and duplies; they find " it incompetent to put the questions proposed by the com- " plainers; repel also the objection of nominal and fictitious " to the respondent's qualification, and therefore dismisses " the complaint, assoilzie the respondent, and decerns."

Against this judgment the present appeal was brought.

Pleaded for the Appellants.—When a great proprietor, whether peer or commoner, parcels out the superiority of his estate amongst a number of his confidential friends, for the avowed purpose of introducing them into the roll of freeholders, every one must see that he can have no object in view but to increase his own influence, or, in other words,

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his power of voting; it being the same thing whether he exercise the power by himself, or by others appointed by him. A system so obviously inconsistent with the constitution, which allows no vote to peers, and only one to commoners, however large their estates, can have no foundation in law.

By the original constitution of Scotland, all the immediate vassals of the crown were obliged, without distinction, to give attendance in parliament; but, in process of time, they became so numerous, and the estates of some of them were so small as to render it necessary to relax from the rigour of the ancient law.—Statutes, accordingly, passed in the reigns of James II. and James IV. of Scotland, dispensing with the attendance of those whose estates were under a certain extent; and at last, in 1587, a material alteration took place, by the introduction of representatives from each county: for the election of whom a statute passed in that year, and ordained:—"That all the freeholders "of the king, under the degree of prelates and lords of "parliament, be warned by proclamation to be present at "the choosing of the said commissioners, and none to have "vote in their elections but such as have forty-shillings "land in free tennandry, holden of the king, and have "their actual dwelling and residence within the same shire."

Some questions having arisen with regard to the right of voting, to prevent these for the time to come, it was enacted by the act 1661, cap. 35, "That besides all heritors who "hold a forty-shilling land of the king's majesty *in capite*; "that also all *heritors*, *liferenters*, and wadsetters, holding "of the king and others, who held their lands formerly of "the bishops and abbots, and now hold of the king, and "whose yearly rent doth amount to 10 chalders of victual, "or £1000, (all feu-duties being deducted), shall be, and "are capable to vote in the election of commissioners of "parliament, and to be elected commissioners to parliament, "excepting always from this act, all noblemen and their "vassals."—The £1000 here mentioned is Scots money, that is, £83. 6s. 8d. sterling, and shows that a tolerable estate was then required to entitle a person to so important a privilege.

To discover whether an estate, on which a vote was claimed, yielded 10 chalders, or £1000 Scots of free rent, might often be attended with difficulty, and much time might be consumed in parliament by trying the merits of controverted elections. A statute was accordingly passed in 1681, which, after reciting the great delay in despatch of public affairs,

&c. enacted:—" That none shall have vote in the election " of commissioners for shires or stewartries, which have " been in use to have been represented in parliament and " conventions, but those who at that time shall be publicly " infeft, in property or superiority, and in possession of " forty-shilling land of old extent, holden of the king or " prince, distinct from the feu-duties in feu lands, or where " the said old extent appears not, shall be infeft in lands " liable in public burdens for his Majesty's supplies for " £400 of valued rent, whether kirklands holden of the " king, or other lands holding feu ward or blanch of his " Majesty, as king or prince of Scotland. And that appris- " ers and adjudgers shall have no votes in the said elections " during the legal reversion, and that after the expiry there- " of, the appriser or adjudger first infeft, shall only have a " vote, and that no other appriser or adjudger coming *in* " *pari passu*, till their shares be divided; that the extent of " the valuation thereof might appear, and that during the " legal, the heritor having right to the reversion shall have " vote. And likewise proper wadsetters, having lands of " the holding, extent, or valuation foresaid, and that appa- " rent heirs, being in possession by virtue of their predeces- " sor's infeftment, of the holding, extent, or valuation fore- " said, and likewise liferenters, and husbands, for the free- " holds of their wives, or having a right to the liferent by " the courtesy, if the said liferenters claim their vote, other- " wise the fiar shall have vote; but both fiar and liferenter " shall not have vote, unless they have distinct lands of the " holding, extent, or valuation foresaid; but that no person " infeft for relief or payment of sums shall have vote, but " the granters of the saids rights, their heirs or successors."

This statute appears to have been anxiously framed, to exclude every species of unsubstantial qualifications. It is true, indeed, that the right of voting, as formerly, was still confined to those who held their lands immediately of the crown; and as liferenters were preferred to fiars, it has been maintained that a liferenter of a bare superiority, yielding him no earthly profit, is entitled to vote, both under the letter and under the spirit of this statute. It, however, had no such qualification in view. It was common in those days, and is so still, to create liferenters and fiars in family settlements: for instance, a father settling his estate upon occasion of his eldest son's marriage, divests himself of the fee, by conveying to his son and the heirs of the marriage, with

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the burden of his own liferent, or, in other words, reserving to himself the enjoyment of the rents during his life. It is plain, in such a transaction, the father continues to have a very beneficial interest in the estate; and it is most just that the preferable right of voting should likewise continue with him. Such instances of real and substantial liferents were plainly what the act 1681 had in view; and not that sort of imaginary liferent of naked superiority, which the invention of modern times has raised up for the mere purpose of multiplying fictitious votes in defraud of the law.

On this footing matters rested until the Union, when, by an act passed in 1707, cap. 8, it was enacted:—"That none "shall be capable to elect, or be elected, to represent a shire "or burgh, in the parliament of Great Britain, for this part "of the united kingdom, except such as are now capable by "the laws of this kingdom to elect, or to be elected, as "commissioners for shires or burghs to the parliament of "Scotland."

No person had then conceived the idea of arrogating to himself more votes than one, by giving fraudulent qualifications to confidential friends, who were to vote according to his directions; but as soon as parliamentary interest became an object of great consequence, the ingenuity of lawyers contrived methods by which the law might be evaded. But, to do away with these, an act was passed, setting forth:—

Q. Anne.

"That of late several conveyances of estates had been made "in trust, or redeemable for illusory sums, noways adequate to the true value of the lands, on purpose to create "and multiply votes in election of members to serve in "parliament for that part of Britain called Scotland, con-"trary to the true intent and meaning of the laws in that "behalf, and enacting, that it should be lawful to or for any "of the electors present, suspecting any person to have "his estate in trust for behoof of another, to require the "following oath from him," (here follows the form of oath).

Still, in process of time, new devices were framed to evade the law, as the practice of creating false votes still continued, which led to a new form of oath; declaring "That his title "was not nominal or fictitious, created in him, in order to "enable him to vote for a member to serve in parliament, "but that it is a true and real estate in him, for his own use "and benefit, *and for the use of no other person whatever.*"

The respondent's title and qualification, it is maintained,

is one of those struck at by the above enactments; and being nominal and fictitious, ought to be annulled and set aside.

Pleaded for the Respondent.—In reference to the act 1681, which gave the privilege of voting to wadsetters and liferenters, no subsequent act appears to have taken away that right so conferred. But, since that time, two acts of material consequence to the present cause have been passed, relative to the qualification of freeholders. These are, the act 12th Anne, and the 7 of George II., the sole object of which was, to prevent persons voting who had not really in them that estate which, from their title-deeds they seem to possess, but it was not the intention of these statutes to prevent wadsetters or liferenters from voting.

As the whole system of law relative to the election of members of parliament is entirely statutory, and depends principally upon the statutes which have already been mentioned, so it is apprehended that judges, in determining any question arising out of that system, are to be directed solely by the enactments of the statutes; they are merely interpreters of the acts of parliament, and have no right to do more than obey the injunctions, and give effect to the particular regulations contained in those acts, from which alone their power of determining as to the qualification is derived. Now, the statutes of Queen Anne and George II., while they were intended to prevent persons from voting, who had not really in them those estates upon which they claimed that right, and to detect latent and implied trusts, of which nothing appeared from the title-deeds; so the statutes pointed out and specified the way and manner in which this investigation was to be made, and ordained every person who claimed the right of voting, to take, when required, certain oaths, which the legislature introduced, as the only means of detecting whether or not a person who, from his title-deeds appeared to be an unexceptionable voter, was truly so: and whether his estate was a true and real estate in him, or only nominal and fictitious.

The legislature having therefore clearly enacted, that, where a freeholder's title-deeds are fair and unexceptionable, and where he takes the oath introduced by the act George II., well known by the name of the Trust Oath, he is entitled to vote for a member of parliament, upon what authority can a court of justice introduce a different examination and mode of investigation from that introduced by law? The act of parliament has said, that a freeholder, taking the oath

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above mentioned, at the request of any other freeholder, shall be enrolled as absolute proprietor of the estate in right of which he claims to be enrolled: upon what ground shall any court of justice say, that notwithstanding a person's having taken that oath, he shall undergo another, and a very different examination, as to the very matter which it is the object of the trust oath to clear up and ascertain? The act of parliament says, that where a person is enrolled, and shall refuse to take the trust oath, his vote shall be held nominal and fictitious, and he shall be erased from the roll; upon what ground then can any freeholder's name be erased from the roll, upon the idea that his vote is nominal and fictitious, without his having refused to take that oath, upon his taking which the legislature has declared that his qualification is no longer subject to the objection of nominal and fictitious?

And this proposition, that the trust oath is the only criterion to discover what votes are nominal and fictitious, does not rest upon the idea that a person who has once been examined cannot be examined again. The respondent has no occasion to resort to this principle. It is because the legislature has prescribed a particular mode for detecting fictitious votes, and has declared, that this mode being followed, is sufficient, and must therefore supercede all others.

After hearing counsel,

LORD CHANCELLOR THURLOW:

"MY LORDS,

"I doubt not this question has created a considerable degree of anxiety with regard to the particular interests to which the consequences of the determination apply. I have the good fortune to stand in a situation perfectly clear of all that anxiety:—having myself no property nor interest whatsoever in that part of the country. The few wishes I could possibly entertain upon the subject, happen by accident to concur with those who wish to sustain the law of Scotland, and, if that could operate anything, it would certainly go to support it; but, my Lords, it operates so little, as to affect in no degree the opinion I entertain. It is likewise true, I do not feel this to be a subject of importance enough to inflame the zeal of any person to act upon the occasion, because from the lapse of time and accidents, a constitution has fallen so far off its true basis, that instead of a representation made by the real and effectual landed property of the country, it is come to be made, or capable to be made, by that which is almost less than a shadow. It is too late

to entertain zeal upon such subjects as those. The single question therefore is, what is the law of Scotland upon the point?

" Upon the other hand, my Lords, if it can be proved, what is contended for at the bar, that the law of Scotland, in regard to the right of voting, is not only in some places, but over the whole of that country, of the nature of burgage tenure, and if that country ought to be represented by such means as Old Sarum is represented. If that can be maintained, it is not your Lordships' duty,—it is not within the compass of your province, to say that all Scotland shall not be represented as Old Sarum is represented; but, on the contrary, it is your business to deduce that to be the true representation of all the landed property in Scotland, if such be really the law of the place.

" With respect to another part of the case, I think the question now under your Lordships' discussion, does not run upon the very same points, with those cases that have been so often quoted and pressed upon your Lordships as settled decisions of this House; because, though I am ready to declare that I do not feel the same degree of concurrence with those decisions which I have been sensible of in most of the other decisions which your Lordships have come to, upon the consideration of the high authority of the great and eminent person who certainly advised those judgments; yet I should certainly have been much disinclined to have gone upon a contrary principle, and, consequently, to have established a contrary rule of decision to what was adopted in this House, when these cases originally began. I don't mean to say, that if that question were to come again before the House, I should look upon it to have been so decided as to make it unfit for your Lordships to renew the consideration of the whole subject.

" It is true, where a matter is decided in the last resort, and all the arguments maintained on that subject, apply to it with a great deal of force, it becomes a matter of much delicacy, and it becomes a matter of great importance, for your Lordships to consider before you will reverse such a judgment as that. But it is impossible for your Lordships to lay it down as a rule, that where a judgment is given, even in the last resort, it will avowedly and expressly change the law. It will bind the law in that particular case irrevocably; but it will not make law in other cases, or between other parties; with regard to him it is *res inter alias acta;* for there is no rule of law founded upon a proposition so absurd as this, namely, That even in the last resort there is an absolute infallibility, so as to render it a judgment conclusive, not only as to the question before decided, but as to the rule of law in all other cases. For example, if by an accident, too strange to be foreseen or imagined, it should ever occur to decide that an estate to a man and his heirs, did not make a fee simple, it would be absolutely necessary for your Lordships, the next time that proposition was stated in the House, to revise the ground

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of that judgment, though in a particular case which might be proposed, an estate to a man and his heirs, would not make a fee simple, nor could be enjoyed but according to the particular right of either party in the case.

" I shall only farther say, on this subject, that I lament exceedingly that which I have read of the opinions of the judges of the Court of Session upon this case. It is certainly enough to make one grave, when fifteen learned senators followed each other in lamenting that there had been such decisions given and pronounced contrary to the statute law of the land, and yet consider themselves as bound by those decisions. I go no farther upon that, because I, in point of fact, on the present occasion, hold the present decision is not quite so correct as, according to my poor apprehension of the thing, I really think it might have been; because to this particular case the former judgments do not apply; and therefore the question being to be determined upon grounds that lay clear of those decisions, it will fall to be determined of course upon those which are the clear grounds of the law of Scotland.

" My Lords, upon that law I shall say but a word upon the jurisdiction of the Court of Session, because your Lordships know, from the history which has been given at your Bar, (and you are familiar with the books themselves), that great pains have been taken in order to prevent the uncertainty which must have arisen in decisions of the House of Commons, and it has been considered one of the greatest advantages that country could boast of, that their rights of election were liable to be made clear, up to the very point of its conclusion, by an examination judicially taken, and before the court of justice of that country. Such was the constitution of Scotland, and therefore the present question will turn upon this: —What is the law of Scotland with regard to the rights of election?

" My Lords, some pains have been taken to introduce an analogy between the rights of election and burgage tenure. I do not think it necessary to enter into it, for several reasons, though it was argued at the Bar. First, if they are exact in saying it, and I could form an opinion, that supposing it to be the law of burgage tenure, it was wrong. I don't sit here upon the terms of having my opinion controlled, unless it be by the clear rules and principles of law, or a long authoritative course of decisions. I imagine there are but few antiquarians who would not say burgage tenure is a right of election in a borough, in the hands of those who held the borough tenements, which tenements paid back to the lord that peculiar species of rent called a burgage rent. The consequence of finding it in that manner would be; first, all the tenants that paid that rent would be capable of voting. Secondly, any tenant in the borough that did not hold the complete tenement, and was not liable to the lord, had not the whole of the burgage tenement, and would not have a title to vote. But, thirdly, I suppose an antiquarian would say, anciently

that those who held the lands, and those only who did hold the lands, would have the right to vote.

" In process of time, it has come in point of reputation, in the general opinion at least, to be the settled notion, that no objection can be made to those votes on account of multiplying them, or upon the account of occasionality. With regard to multiplying—it is certainly true each tenement cannot be divided; so in that respect the votes cannot be multiplied beyond what they might have been at any prior time. With regard to occasionality, that is not the question that obtains here: for we are not now upon the subject of occasionality —it is a mistake to suppose *that*.—We are now upon the question, whether occasional or otherwise, a real substantial *bona fide* estate has been gained by the person pretended to be put upon the roll? And occasionality is only a circumstance of evidence to show that the estate which stands well upon parchment is yet not sound at the bottom, and that he has not a right to vote. My Lords, I need not trouble your Lordships with stating, it is no part of the law of Scotand, that a man shall have as many votes as the extent and value of his property would go to, if divided. That any individual may come to the next Michaelmas Court of freeholders, and insist upon being put upon the roll for five or ten houses, or any other given number, because his property is of such extent, that if it were divided into five or ten, ergo, five or ten would vote. That is certainly not contended on any hand. Therefore all that is said upon the pretence of Lords or Commons,—men of great fortune in that country—having great weight in the representation, falls to the ground. It is clear then that the policy of the law of Scotland does not mean to give to any man, let his fortune be what it will, more than one vote.

" That being the settled point, the single question is, whether Sir John Macpherson, the person here in question, has one vote? How is that to be tried?

" The earliest law alluded to, as material to the present question, is the statute of 1681. That statute is understood to have no new law on the subject of qualification, but only defines what was the real estate in land that should entitle a person to vote:—namely, being publicly infeft in property or superiority—which was a circumstance in evidence to show his title to the land *bona fide*. I do not go upon the words respecting the smaller estates,—they are only articles of evidence, but being publicly infeft and actually in possession,—the question is then—' What is the true meaning of those words, being *really* and *actually* in *possession ?*' My Lords, if nothing more depended upon it than only to satisfy the unbiassed judgment of any individual in explaining " what being actually in possession means," one would think the common language we hear so commonly used at the bar, as applied to those oaths called the *trust* and *possession* oaths, would be pretty nearly sufficient to show what the real idea

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of the country is, as to being possessed; all the terms contained in those oaths were the ingredients to prove, whether the persons are or are not in actual possession; but, without referring to the calculation that has been made, or appears to be made, by those that thought upon this subject, let us keep a little closer to the acts of parliament themselves.

" After 1681, the next act is the 12th of Queen Anne, which recites, that often persons got into the apparent possession of lands, either in *trusts* or *redeemable* for illusory sums, no ways adequate to the true value of the lands, to create and multiply votes contrary to the true intent and meaning of the former acts; and then it proceeds to provide, only that they shall be infeft a certain time before they shall be at liberty to act for their own accord, but they shall also take an oath to the effect mentioned in that act of parliament; and it is upon this latter that the principal part of the dispute arises. It is worth attending to this act of parliament, with a view to consider how that dispute has been managed.

" On the one side, it has been contended, that if the person will swear he is not within such and such circumstances stated in the oath, proving the tenure of the estate to be what is there represented, then he shall have a right to vote; but that you shall prove that he is in those circumstances, only by his refusal to take the oaths, and in no other way whatever. And your Lordships have been told very seriously that this is the most beneficial, and the most effectual manner of preventing those frauds; because, by driving them to swear in that manner, there is no doubt in the world you purge them in the most efficient way possible. There can be no better way of construing the act of parliament than through that medium. If you suppose the oath accumulative, there is no doubt in the world. It is additional to those securities that existed before, and will exist after the oath is given. The oath does tend, in a certain degree, to purge the roll of those that ought not to be upon it. But if you suppose it a commutation, that is, instead of being at liberty to proceed against them any other way, you shall have the benefit of examining them upon oath, there cannot be a worse bargain made in the world. In that manner, all those who are content to take an oath of this sort, though false, shall be admitted upon this roll; and those who scruple to take a false oath shall be rejected. Another objection is made upon the statute of Anne, that all those who take the trust oath shall be competent. Your Lordships will recollect, this statute relates to elections only, and notwithstanding such oath taken, it declares that other objections may be made as to the right of persons to be elected or to elect; and therefore to fancy any other ground can possibly be made, is wrong, when it does not come within the view or object of this statute in any view whatever.

" The act of the 7th of Geo. II. has done no more than alter the form of that oath; and nothing occurs to me to observe upon the al-

teration of the form of the oath of the 7th of Geo. II. except this, that they are obliged to swear they have given no promise, obligation, bond, back bond, or other security whatsoever, except what appears upon the face of the instrument itself. Now how can it be inferred that he has given no promise, obligation, deed, back bond, or other security, except those which appear upon the face of the instrument itself, when there is in the engagement, indorsed upon the back of the instrument of conveyance, a simple promise to reconvey, the oath might be well taken in regard to it; but will any body argue, if there were such a simple promise to reconvey indorsed upon it, it would not be an objection to the oath?—the form of the oath proves this. If the objection appeared from the indorsement upon the instrument, and they do not call upon you to swear, it is the fault of those who ought to impeach the title, that they do not take notice of it; but in regard to such objections which do not appear upon the instrument itself, you shall be called upon to take your oath.

"The whole of this argument, according to my poor judgment, has gone into a vast deal of confusion, for want of observing what the oath applies to, and what it does not apply to.

"This is a question upon the title of Sir John Macpherson to be admitted upon the roll.

"I observed it was so stated at the bar. Some noble Lords observed he was the claimant. Yes he was; and it is easy to see if there happened to be a majority of the people of the same description as himself, he would be admitted on the roll. No doubt the law was calculated to redress that mischief, by applying to the Court of Session and demonstrating to them that he ought not to be put upon the roll. So your Lordships are determining the question exactly in the same form as if he had not been put upon the roll.

"Now, let us see a little what the policy of the law of Scotland, as it stands upon these acts of parliament, is, with regard to this subject. In the year 1681, it was provided, there should be a roll of freeholders made up, not only at the election of members of parliament, but at each of the Michaelmas courts, to provide against such partialities as these political assemblies were too much liable to in their own natures, and to prevent the judgment resting even upon the parliament of Scotland. I dare say they were liable to the same sort of abuse and complaints as the parliament of England in subsequent times. But the policy of the act was to give to the freeholders, the original right of deciding upon the titles of those who were to vote at the Michaelmas head court at the time, and it was provided by that act, that unless an objection was made at the time, no objection should be made afterwards, and as far as the election was thought of at the time, it was meant to make the parliament a court of appeal. The freeholders were first to determine, and the parliament afterwards; so it stood for a considerable time.

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It has been supposed that from the year 1681 to 1743 (the date of the statute 16th of Geo. II.) if the freeholders had put an improper person upon the roll, without an objection stated against him at the time, there was no way of correcting that abuse. With submission to that opinion, I doubt it. I hold that the general jurisdiction of the Court of Session would have enabled them, not in a summary way, as provided by the 16th Geo. II.; but it would have enabled them, in the ordinary course of their jurisdiction, to have reformed such abuse. I take it to have been determined in regard to boroughs where relief has been got from the ordinary jurisdiction of the Court of Session. But the 16th Geo. II. gives a summary jurisdiction upon this subject. How does the summary jurisdiction apply? Not to the right of election. The Court of Session has no summary jurisdiction as to that, nor ever had. I do not say, never had; for the act of 1681 gave it expressly. But from the time of the Union to the 16th Geo. II., the Court of Session never had a summary jurisdiction to try the right of election. That must and could have been tried by the House of Commons only. The 16th of Geo. II. has been thought by some to have intended vesting the whole of the jurisdiction in the Court of Session;—and I confess for myself, I find it a very difficult matter to invent, or state a case, where the House of Commons can properly interpose, at least with regard to a person's title to be on the roll. But why do I entertain that difficulty? because, if that statute of the 16th Geo. II. gave the Court of Session an authority over the roll, in all the extent of making up that roll, I find it a difficult matter to suppose a point of objection that does not come within the range of that authority.

"I have always heard learned persons from Scotland, whom I have conversed with upon the subject, speak with some degree of horror of the House of Commons interposing; and I always thought they looked upon themselves as secure upon the idea the House of Commons would not do it;—but still, in respect to this argument, it makes little, for this is a question, not upon the right of voting at elections, but upon the right of standing upon the roll.

"Now, let us consider how the oath provided by the statute of Queen Anne could possibly apply to this case. And I refer myself to that oath chiefly for the purpose of showing it has absolutely nothing to do with the subject matter of the present dispute,—that is,—whether a man should stand upon the roll or not; for, as the oath of the 12th Anne was, it could not have been put to him, but at the election of members to serve in parliament. He was at liberty to stand upon the roll at that time, and therefore to vote for others standing upon the roll; and he could have gone on for seven years together, adjusting the roll from Michaelmas to Michaelmas according to his own judgment, and there was no way of putting the oath to him. Thus it stood till the 7th of Geo. II., twenty years thereafter. If it be clear the oath administered in virtue of the 12th of

Queen Anne had no relation to standing upon the roll, and merely to the right of election upon that oath so taken, how was it possible the parliament at the time thought, that the oath so to be taken upon the occasion could possibly afford the least degree of security to the interest of the freeholders, that they should not have persons put upon the roll to depreciate their votes? A number of good votes came, and a number of bad votes of little value,—if they do not concur to depreciate them, how could they suppose or conceive an oath so inapplicable could produce the least effect to that end? What then can be made of that oath? It was said on one side, it was the intention of the legislature, a man should be bound to swear to that effect, but that the contents of the oath were totally immaterial to any other purpose; so that, if the facts were ever so clear that that oath was false in all respects and purposes whatever, yet it was intended by the act, if a man would swear at the election of members of parliament, he had not that fictictious sort of estate, he was entitled to stand upon the roll, to all other effects, and to all other conclusions whatever; and the parliament really hoped to purge the roll by this means. What signifies coming upon the roll? You can only vote for the preses, and for the persons eligible to serve in parliament, to stand upon the roll. The rest of the foundation will break down under you, and you will be obliged to take this oath. If you refuse, what is the effect? If under the statute of Anne he could not vote, yet he might by the statute of Anne remain upon the roll, and if, after the election of members of parliament, twenty others had been put upon the roll, he would have had a voice in putting them upon the roll. The counsel therefore shift their ground to the 7th Geo. II. It is impossible to shift their ground—they cannot, for that act contains no new enactment. It is merely a correction of the statute of the 12th of Queen Anne. It is impossible to argue that there is any intention upon the corrected oath of the 7th Geo. II. which is not applicable to the 12th of Queen Anne. But, if it were so, it would vary it in a degree; but in principle it would not vary it at all, for even as it stands upon the oath of the 7th Geo. II. this consequence follows, that if a man refuses to take the oath, either at the Michaelmas meeting, (formerly it was not there, but at an adjournment of the roll, but it is applied to the Michaelmas meeting) or the election of members of parliament, he is to be struck off the roll. I do not know why he should be so, if their construction of the 12th of Anne is right. I do not know why he should, after the act was mended in the 7th Geo II., be struck off the roll of freeholders. So the law stands in other respects even now. If a man can be enrolled in conscience; it is not true, if a man comes in person to be enrolled, he cannot have the oath put to him,—there is not such a circumstance in the whole act. But he must be upon the roll before he can have the oath given him. There was a case determined in this House, and so the law is understood to stand

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by the 10th section of the 16th of Geo. II. that those oaths which are to be given before the election of a preses, do not extend to the qualification oath, but only to the oaths of government. Upon that, it has been determined, where a man was enrolled, and where a man, upon the postponing before the rest of the business was done, went away to avoid taking the oath, the Court of Session struck him off the roll; this Court, upon his application, reversed it. They held his going away, was not a refusal to take the oath, and therefore he had a right to stand upon the roll. It is therefore a clear proposition, that he may vote for the preses and clerk of the preses; the preses, if we are rightly told, has a double voice; thus the election may be carried by the voice of one to whom this oath cannot be put.

" I do think the decision of the present question, does not signify an iota; for, from what I am told of Sir John Macpherson, and the character he has held, and from the character he holds in the world, that he will not take such an oath, I believe no more than I shall take it myself. But it is of importance to the question, that a man in that situation might stand upon the roll, and produce the effect now mentioned. At the sametime, the circumstance of his being capable to produce such effect as that of inconvenience, which manifestly results from the effects so produced, are not the grounds of my argument. I only use them as illustrating: that is, as tending to show that neither the one nor the other of those oaths related to the right of individuals to be put upon the roll. They relate to a different subject, and ought not to be confounded with that. If you take that to be clear, what does it amount to? No more than this; a question, whether an oath to be taken, in order to exercise one out of many franchises that belong to a freeholder, and an oath by which he may exercise many franchises, and takes it to exercise one out of many, whether that oath was intended by the legislature to give him, from the possibility of that being put to him, (whether put or no is the same thing), a complete title to exercise all other franchises whatsoever; including those to which the oath did not relate. Taking it in that way, seems to be a proposition monstrous and untenable. Let us see what is the question in this particular case? Sir John Macpherson's agents, in his absence, tendered his papers, which seemed to be tolerably fair, a circumstance that made the freeholders a good deal astonished, and they hesitated. But the majority of the freeholders not being people in general, of a description to be much astonished, or have any hesitation upon such points as these, agreed to enroll him. Then a process is brought, under the 16th of Geo. II., complaining they had done wrong; for notwithstanding what appeared upon the face of the titles, yet he had no real substantial right, but merely a nominal and fictitious one, and he ought to be rejected. A great deal of argument was used at the Bar to say, that they think the words nominal and fictitious were not founded in fact. Nominal and fictitious is the definition by which I call it, because he cannot be fairly the

man he is described, and the counsel who said so, did himself define it in the next sentence, very nearly, by *aliud agit, aliud simulat.* He produces titles which, on their face, import to carry an estate; but he has obtained them under circumstances which, if disclosed, would show that nothing like such a conveyance was in the contemplation of the granter or grantee.

" The next step in the course of pleading, is to call on the other side to confess or deny what would go, some way or other, to establish the fact. My Lords, after what we have heard at the Bar, it is material we should be apprized what this kind of proceeding means. The learned gentleman who appears for the respondent, and whose knowledge in that law has been very useful on many occasions to the House, has told you expressly, that this is the usual course of pleading in the Court of Session. If a man is called upon to confess or deny, he is bound to do so; if he confesses, the fact must be taken to be true; but whether that fact is conclusive, is a different matter. If you call upon a man to confess circumstances, and if the circumstances do not conclude, the consequence is, to avoid the confession. It does not, on the other hand, preclude the other party from giving additional evidence, which may obtain judgment another way; but if neither the thing confessed, nor the additional evidence, creates a case which, in the opinion of the Court, does not bind it, there must be a judgment of *absolvitor.* The question being put in this manner, the Court takes it up, and pronounces a judgment of absolvitor, upon its being proposed that the defendant should plead in this manner. The Court of Session have taken it into their heads, that some judgment in the House of Lords prevented them. From what?—not only from putting the trust oath, but from putting the oath of verity. That oath is a contract between two parties in a suit, where one party says, I waive all other proof, and refer it to you, my adversary, whether such facts are true. He may do so; but he cannot afterwards produce a witness to the same point the party has been examined to. He is obliged to abide by it upon those points. It is a contract between the parties. I see some doubt, if the oath of trust has actually been put, and is to be considered as an oath of verity, Whether other evidence can be resorted to? and upon that the House seems to have gone in the cases alluded to. But the very argument proves that the House had no idea that the matter could not be examined by other means. What a monstrous proposition was laid down by the Bar, That if a man were to have his back bond produced to him, and it was proved he made a contract to give up the estate, yet the legislature means to say, that if he was bold enough to perjure himself, he should be entitled to the franchise *eo nomine* as perjured. It is impossible to state it in any other manner. And the Court of Session cannot interfere, and the person must not only remain upon the roll to all eternity, if he will venture to swear contrary to every proof that ex-

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isted in the world, even contrary to what may appear on the face of the instrument he produces. If the Court of Session can by any other means than putting the oath of verity and reference, discover the fraud, your Lordships' judgment is so far from damaging their jurisdiction and authority, as by the argument is supposed, that the judgment itself tacitly affirms the former judgments, and declares that the Court of Session ought to go upon all other points; therefore the question here certainly does not arise upon that peculiarity, whether they are at liberty, like parties in ordinary suits, to put it by reference to the oath of the party. The Court of Session were extremely mistaken if they supposed your Lordships meant more than was said. I do not believe any noble lord at that time would have said, the Court of Session must not meddle with it at all. The inquiry is thrown upon them by the act of 16 Geo. II. Their jurisdiction is not to be doubted, but could not be given merely to see whether the estate was good *ex facie* of the title deeds. They must hear every pertinent complaint against the title. Then why not demur to it? The allegation would state of course that they were to produce certain deeds, purporting to be the conveyance of a life estate in a superiority, which, for the information of those lords that do not know the subject so well as others, I will inform them at once what it is. It is a life estate in a "Baubee," or it may be the 24th part of a penny, in an estate that pays at the rate of £400 a-year rent; and a man sells that estate, and by sub-infeudation gives the whole valuable part of that estate to another, and reserves sixpence rent upon the sub-infeudation, and he converts that into as many parts as there is language in Scotland for small money; and they have all good votes. That is, My Lords, the constitution of Scotland.

"Now, it is insisted that if a freeholder comes to the Court of Session, and states that he has that form of conveyance, which bears upon the face of it to be an investiture of the estate, but, in point of fact, which really gives no sort of substantial title to it, the Court of Session shall not inquire into it. Then the best thing is not to let them go on turmoiling in that way, and saying, by way of exception, there is nothing relevant in the charge. The best way would be, not to suffer such to be made at all. These are conclusions so plain, that I do not think myself much at liberty to go into argument upon it. Upon the other side, they have gone into arguments to prove, by a contrary doctrine, that fair votes may thus be cut down, if the Court of Session are to decide upon their ideas of honorary engagements, and things of that sort. I do not mean by honorary, the engagements which gratitude or the force of obligation compels a man to think himself bound to perform; for such obligations draw him to exercise a judgment upon the subject; but I mean that a fair qualification should be something paramount to leaving in the hands of the granter, the disposal of that very subject which *prima facie* he appears to have parted with.

"Then they object to the last question. Don't you think yourself in honour bound, &c.? I do not think that question should be put, whether the transaction be collusive or not. It is like the falling of a star in my mind. But collusive or not, he has a right to call upon him, to relieve him from the thing. If the questions or answers be material, then he must proceed; but if not material, the defendant cannot be hurt; but at this stage I cannot say that it is totally immaterial, because what a man thinks in his own mind, may be a mere sensation, and amount to nothing. But if that impression upon his mind, arises out of the rest of the transaction, it extends itself to the granter, and may show what was the consideration of the grant. If it passed from the mind of the granter to the grantee, and from the mind of the grantee to the granter, (I do not ask what you mean, or whether it is in writing or in words,) but if in fact, there existed such a promise to reconvey, it comes within the very words of the act of parliament, whether the questions here proposed, be sufficient or not sufficient questions—upon those points I do not stop to enquire. When you talk of an estate given to a son, or to a brother, and purchased for a valuable consideration, in a place where nothing but 8 or 10 votes decide the election in a borough, I understand that at once: and because a man thinks fit to have an interest in such an election as that, and to give a solid sum of money, (and seats in parliament may amount to no inconsiderable part of an estate,) and upon the eve of an election, when he is desired to vote for a particular candidate, he says no, I have nothing to do with you my granter, I never meant to vote for whomsoever you may mean to put up. It may be said, or hinted, that it was expected he should, and that the qualification was granted upon that expectation, but it may be refused. If Sir John Macpherson was told it was out of the great personal kindness the Duke of Gordon had for him, that he made him a present of this right to vote, it would be thoroughly understood between them, and by any gentleman that hears me. If a vote of that sort were offered him, and he had no disinclination to be the servant of the noble Lord, he would ask no questions, but take his vote, and poll, and go on; but if he dislikes it, he would say: 'Let me understand how this is; whether really there has been that sort of heartiness and kindness which I did not know of. I did not know you were so kind as give me the vote; but if there is the least degree of understanding that I am to vote for any kind of character you may put up at the next election, from my notion of honour with regard to you, I will not take it.' I do not think a vote of this kind can pass from one gentleman to another without its being well understood. Sometimes it may be understood from circumstances. I should think it would be better if it was a little more explicitly understood in general. What does it amount to? If it is out of the reach of all possible enquiry, there let it lie. If you will not let it so lie,—as many proofs as I can get I will get; and what I cannot get at I will not

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decide upon; but I will go as far as I can. Therefore do not entertain an idea, that I have a notion that the way prescribed may not be in accordance with the law of Scotland; and if what I decide is the law of Scotland, it must stand till somebody thinks proper to alter it. And as to the question, whether the principle of it fail, I am very far from being one of those who examine into the principles for the sake of overturning the constitution of any place; much less of a country that has flourished for so many ages, and has risen to that height of greatness and prosperity under that constitution. I should take him to be a bold man that would undertake, upon any abstract proposition whatever, to new model the constitution of a country under such principles as these, unless he can state that these principles are false. I give no opinion upon that subject. The humble advice I propose, goes upon as perfect a conviction as any solid reason can establish, that I am speaking the law of Scotland, and not from any private zeal, or public wishes, or any private objects upon that subject. In consequence of which, I move your Lordships to reverse the interlocutor, and to declare that the defendant shall confess or deny the truth of the several matters contained in the averments."

It was ordered and adjudged, that the interlocutor complained of be reversed; and it is further ordered, that the respondent do confess or deny the averments in the appellants' pleadings.

For Appellants, *Tho. Erskine, Alex. Wight.*
For Respondent, *Sir J. Scott, Wm. Tait.*

WILLIAM WADDEL of Easter Moffat, universal disponee of WM. WADDEL of Calderhead. . . . . } *Appellant;*

ELIZABETH, AGNES & ANN WADDELS, Sisters of the Deceased HENRY WADDEL, } *Respondents.*

House of Lords, 20th Dec. 1790.

PROOF—EVIDENCE—BORROWED MONEY.—A party held no vouchers or documents of debt, for sums of money lent to his brother. The only evidence of these being some jottings in the brother's account book, and other separate accounts.—Held, that these were not sufficient evidence to support the claim made after the death of both.

This was an action raised by the appellant, against the